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No. 95-563

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CONSTRUCTION AND LABORER'S UNION LOCAL NO. 324, JESSE THOMAS, JESSE DURRAN, JR., JESSE DURAN, SR., and CHARLES EVANS,
Petitioners,

v.

DOUGLAS MURRAY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF

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APP

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DEVELOPMENTS BEFORE THE COURT SUBSEQUENT TO THE FILING OF THE PETITION FOR CERTIORARI IN THIS CASE MERIT EITHER DELAY OF THE COURT'S DECISION WHETHER TO GRANT CERTIORARI OR TREATMENT OF THIS MATTER AS A COMPANION CASE.

It has come to Petitioners' attention that this Court recently heard oral argument on a case addressing the constitutionality of punitive damages, *BMW of North America Inc. v. Gore*, 94-896 ("*BMW*"). Since the issues in that case are relevant to this matter, Petitioners respectfully request that the Court defer its decision on the Petition for Certiorari in this case, with respect to the issue

of the constitutionality of the punitive damages imposed, until it rules in *BMW*. In the alternative, Petitioners ask that the Court consider this matter for possible treatment as a companion case to be decided concurrently with *BMW*.

One of the questions presented in *BMW* is whether a punitive damage award amounting to 500 times the compensatory damages assessed is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment. In the instant matter, Petitioners have asked the court to rule on whether a punitive damages award nearly 800 times the compensatory award against a union is unconstitutionally excessive and violates the national labor policy, articulated by this Court as implicit in the National Labor Relations Act, against imposing punitive damages against unions. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979).

The Court may be able to dispose of much of its analysis of the substantive due process issues raised by the instant matter by reference to its opinion in *BMW*. This case merits further consideration, however, because of the implication of the conflict between the policy in favor of allowing civil juries to punish and deter wrongdoing with punitive damages and the labor policy against imposing punitive damages against unions. That conflict of policy provides an optimal context for examining the substantive contours of the appellate review of punitive damage awards required by the Due Process Clauses of the Fifth and Fourteenth Amendments. The failure of the courts below to take into consideration the policy articulated by this Court against imposing punitive damages against unions when reviewing the massive award in this case underscores the fact that, to satisfy due process, the procedure provided by appellate courts to review punitive damages must be substantively defensible. Otherwise, there is no assurance that punitive damages are imposed rationally. A mere right to review of punitive damages for reasonableness, if not coupled with a right to a correct determination

by an appellate court as to whether a punitive damages award is reasonable under all the circumstances of the case, is but a right to an empty ritual.

The Court may wish to decide this case concurrently with *BMW*, in order to provide as comprehensive as possible an analysis of the kind of substantively rigorous review an appellate court must conduct to satisfactorily address the constitutionality of a punitive damages award.

Petitioners wish to note, however, that the other two issues presented in this case, having to do with (1) removal of a known holdout juror during deliberations of a hung jury and (2) the conflict of duties under the National Labor Relations Act and the Labor Management Reporting and Disclosure Act created by the courts' rulings below, are not related to the *BMW* case. Thus, Petitioners ask that the Court not delay its decision whether to grant certiorari on those important issues.

CONCLUSION

Therefore, it is respectfully requested that the Court either defer its decision on the Petition for Certiorari in this matter, with respect to the punitive damages issue, until it issues an opinion in *BMW*, or consider treating this case as a companion to *BMW*.

Respectfully submitted,

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